

**United States Department of Labor
Employees' Compensation Appeals Board**

E.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, MO, Employer**

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**Docket No. 06-471
Issued: October 24, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 27, 2005 appellant filed a timely appeal of April 21 and July 11, 2005 decisions of the Office of Workers' Compensation Programs which denied merit review of his claim. Because more than one year has elapsed between the most recent merit decision dated August 2, 2004 and the filing of this appeal on December 27, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's requests for reconsideration dated February 20 and May 24, 2005.

FACTUAL HISTORY

On March 24, 1998 appellant, then a 34-year-old mail handler, filed a traumatic injury claim alleging that on March 23, 1998 he sustained a back injury after lifting mail trays while in the performance of duty. The Office accepted appellant's claim for low back sprain and

permanent aggravation of lumbar disc disease at L4-5. Appellant stopped work on March 23, 1998 and received appropriate benefits.

On August 7, 2002 the employing establishment offered appellant a temporary light-duty position four hours daily. Appellant returned to work partial days. A work capacity evaluation dated October 29, 2002, prepared by Dr. Steve Simon, Board-certified in physical medicine and rehabilitation, diagnosed chronic low back pain and advised that appellant could work four to six hours per day subject to various restrictions including sitting and standing and changing positions. On October 23, 2002 the employing establishment offered appellant a temporary light-duty position four hours per day. Appellant refused to sign the job offer until his physician approved the position.

By letter dated November 29, 2002, the Office notified appellant that there was evidence that he may have sustained a recurrence of disability and requested that he submit additional medical evidence.

Appellant submitted an emergency room report dated December 16, 2002 which noted that he was treated for low back pain and was diagnosed with low back pain and lumbalgia. In a January 16, 2003 report, Dr. Simon diagnosed chronic opiate dependence discogenic back pain from L4-5 and recommended appellant work four to six hours per day subject to restrictions.

On January 2, 2003 appellant submitted a Form CA-7, claim for compensation, for the period December 16 to 18, 2002.¹

In January 2003, appellant filed a Form CA-2a, notice of recurrence of disability, indicating that he sustained a recurrence of back pain in February 2001 causally related to his accepted employment injury.

In a decision dated February 24, 2003, the Office denied appellant's claim for recurrence of disability for the period December 16 to 18, 2002.

Appellant requested an oral hearing before an Office hearing representative, which was held on December 17, 2003. Appellant submitted reports from Dr. Simon dated March 19, 2003 to May 20, 2004. He diagnosed chronic opioid dependent pain secondary to degenerative joint disease and anxiety disorder exacerbated. Also submitted was an x-ray of the lumbar spine dated October 2, 2003 which revealed degenerative changes at multiple levels and an L4-5 disc space narrowing due to a disc herniation or degenerative changes. A magnetic resonance imaging scan of the lumbar spine dated October 29, 2003 was also submitted. By decision dated April 12, 2004, an Office hearing representative affirmed the February 24, 2003 decision on the grounds that the medical evidence submitted was insufficient.

Appellant subsequently requested reconsideration and, in a decision dated August 2, 2004, the Office denied modification of its prior decision.

¹ The Office adjudicated appellant's claim as a recurrence of disability for the period December 16 to 18, 2002.

On February 20, 2005 appellant requested reconsideration. He submitted reports from Dr. Simon dated July 23, 2003 to February 1, 2005. Dr. Simon diagnosed chronic low back pain, degenerative disc disease and anxiety stress disorder. Reports from December 30, 2004 to February 1, 2005 indicated that appellant was disabled due to chronic pain and depression for the period December 10, 2004 to February 1, 2005. On February 3, 2005 Dr. Simon noted appellant's work injury of March 1998 and advised that appellant's diagnosed condition of depression, anxiety and chronic pain were related. Appellant submitted nursing notes dated May to September 2004. A May 19, 2004 report from Dr. Donald A. Rosenfield, a psychotherapist licensed as a clinical social worker, noted treating appellant since October 23, 2001 for stress and anxiety. A note from Dr. E. Michael Young, a Board-certified psychiatrist, dated February 1, 2005, indicated that appellant was excused from work on that day for a doctor's appointment. Appellant submitted a report from Dr. A. Thomen Reece, a Board-certified psychiatrist, dated February 11, 2005 who noted that appellant would be off work from February 7 to 11, 2005 due to a motor vehicle accident on February 7, 2005.

By decision dated April 21, 2005, the Office denied appellant's reconsideration request finding it insufficient to warrant further review of the April 12, 2004 decision.²

In a letter dated May 24, 2005, appellant requested reconsideration and submitted additional medical evidence. He submitted a sleep study dated March 29, 2005 which revealed a sleep disorder and a work capacity evaluation prepared by a physical therapist dated April 8, 2005. A June 1, 2005 computerized tomography (CT) scan of the lumbosacral spine revealed degenerative changes. An operative report dated June 1, 2005 noted that appellant underwent a discography of the lumbar spine which revealed disc degeneration at L4-5, mild degeneration at L5-S1, herniated nucleus pulposus at L4-5 and normal disc at L3-4. He submitted a work status report from Dr. Simon dated June 2, 2005 which indicated that appellant could not work from May 27 to June 29, 2005 as he was undergoing testing. A June 26, 2005 functional capacity evaluation indicated that appellant could work light duty with a lifting restriction of 20 pounds. A report from Dr. William O. Reed, Jr., a Board-certified orthopedist, dated June 27, 2005, reviewed results of the discogram and noted findings significant for symptom magnification. He advised that appellant could continue to work a sedentary position with no lifting over 10 pounds. A report from Dr. Susan Laningham, a Board-certified family practitioner, dated July 7, 2005 indicated that appellant had been off work since February 7, 2005 due to severe sleep apnea and could return to work on July 11, 2005.

By decision dated July 11, 2005, the Office denied appellant's reconsideration request on the grounds that the evidence was insufficient to warrant merit review.

² The Office noted that appellant requested reconsideration of his denial of recurrence claim as well as his claim for consequential injury. However, the Office advised that a formal decision was not issued with regard to appellant's claim for a consequential injury and therefore that issue would not be addressed in this decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁴ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the [Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵

ANALYSIS

Appellant's November 9, 2004 and February 20, 2005 requests for reconsideration did not meet any of the three regulatory requirements, noted above, for reopening his claim pertaining to whether the Office properly denied his claim for a recurrence of disability from December 16 to 18, 2002.

Appellant's February 20, 2005 reconsideration request asserted that he submitted sufficient evidence to show a worsening of his back condition. However, appellant's letter did not show how the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office had previously considered appellant's contention that his back condition had worsened and he did not set forth a particular point of law or fact that the Office had not considered or established that the Office had erroneously interpreted a point of law with regard to his contention. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered, appellant submitted medical reports from Dr. Simon dated July 23, 2003 to February 1, 2005 who diagnosed chronic low back pain, degenerative disc disease and anxiety

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.608(b).

stress disorder. Other reports from December 30, 2004 to February 3, 2005 noted a history of appellant's work injury of March 1998. Dr. Simon advised that appellant's diagnosed condition of depression, anxiety and chronic pain were related and indicated that appellant was incapacitated due to chronic pain syndrome and depression from December 10, 2004 to February 1, 2005. However, these reports are not relevant because they do not specifically address the issue of whether appellant sustained a recurrence of disability on or about December 16, 2002 causally related to his accepted work injury of March 23, 1998. Additionally, these reports are similar to the physician's reports already contained in the record⁶ which were previously considered by the Office. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Other reports from Drs. Young and Reece are not relevant because they do not address the issue of whether appellant sustained a recurrence of disability on or about December 16, 2002 causally related to his accepted work injury of March 23, 1998.⁷ Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."⁸

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied his November 9, 2004 and February 20, 2005 requests for reconsideration.

With regard to appellant's May 24, 2005 request for reconsideration, appellant's letter did not show how the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Additionally, appellant did not set forth a particular point of law or fact that the Office had not considered or establish that the Office had erroneously interpreted a point of law with regard to his contention.

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a sleep study dated March 29, 2005, a work capacity evaluation, a CT scan of the lumbosacral spine dated June 1, 2005, an operative

⁶ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; see *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁷ The record reflects that appellant also submitted nursing notes and a report from a social worker; however, the Board has held that treatment notes signed by a nurse are not considered medical evidence as a nurse is not a physician under the Act. See *Sedi L. Graham*, 57 ECAB ____ (Docket No. 06-135, issued March 15, 2006) (the reports of a social worker do not constitute competent medical evidence, as a social worker is not a "physician" as defined by section 8101(2)); *Roy L. Humphrey*, 57 ECAB ____ (Docket No. 05-1928, issued November 23, 2005) (registered nurses, licensed practical nurses and physicians' assistants are not "physicians" as defined under the Act). See also 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

⁸ 20 C.F.R. § 10.606(b).

report dated June 1, 2005 and a functional capacity evaluation dated June 26, 2005. However, as noted above, these reports, to the extent that they are from physicians, are not relevant because they do not specifically address the issue of whether appellant sustained a recurrence of disability on or about December 16, 2002 causally related to his accepted work injury of March 23, 1998.

Appellant also submitted a report from Dr. Simon dated June 2, 2005 who indicated that appellant could not work from May 27 to June 29, 2005 as he was undergoing diagnostic testing. A report from Dr. Reed dated June 27, 2005 noted reviewing discogram results, related findings significant for symptom magnification. A report from Dr. Laningham dated July 7, 2005 who indicated that appellant had been off work since February 7, 2005 due to severe sleep apnea. However, these reports are not relevant because they do not specifically address the issue of whether appellant sustained a recurrence of disability on or about December 16, 2002 causally related to his accepted work injury of March 23, 1998.

Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant neither showed that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office, nor did he submit relevant and pertinent evidence not previously considered by the Office.”⁹

CONCLUSION

The Board finds that the Office properly denied appellant’s requests for reconsideration dated November 9, 2004, February 20 and May 24, 2005.¹⁰

⁹ 20 C.F.R. § 10.606(b).

¹⁰ With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 11 and April 21, 2005 are affirmed.

Issued: October 24, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board